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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS FOURTEENTH SESSION (Vienna, 3-14 September 1990)

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session, 1/ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Gro[illegible]. 2/

3. At its thirteenth session, the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to its fourteenth session a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

4. The Working Group, which was composed of all States members of the Commission, held its fourteenth session at Vienna, from 3 to 14 September 1990. The session was attended by representatives of the following States members of the Working Group: Argentina, Cameroon, Canada, Chile, China, Cuba, Czechoslovakia, Egypt, France, Germany, Federal Republic of, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Morocco, Netherlands, Nigeria, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America.

5. The session was attended by observers from the following States: Austria, Bolivia, Finland, German Democratic Republic, Pakistan, Panama, Poland, Saudi Arabia, Sweden, Switzerland, Thailand, Turkey and Venezuela.

6. The session was attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Commission of the European Communities (CEC), Hague Conference on Private International Law, European Banking Federation, International Chamber of Commerce (ICC).

1/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 18.

2/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

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7. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. J. C. Treviño (Mexico)

8. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.66), a note by the Secretariat containing a first draft of general provisions and an article on establishment (A/CN.9/WG.II/WP.67), and a note by the Secretariat discussing further issues of a uniform law: amendment, transfer, expiry, obligations of guarantor, liability and exemption (A/CN.9/WG.II/WP.68).

9. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a uniform law on guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 7 of the uniform law.

11. The Working Group then considered the issues discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68). The deliberations and conclusions of the Working Group are set forth below in chapter III. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft of articles on the issues discussed.

12. It was noted that the Secretariat would submit to the Working Group at its next session a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

II. CONSIDERATION OF FIRST DRAFT OF GENERAL PROVISIONS AND ARTICLE ON ESTABLISHMENT

13. The Working Group considered draft articles 1 to 7 as set forth with explanatory remarks in a note by the Secretariat (A/CN.9/WG.II/WP.67).

Article 1. Scope of application

14. The text of draft article 1 as considered by the Working Group was as follows:

"This Law applies to an international guaranty letter [issued in this State]."

15. In connection with the discussion on the scope of application of the uniform law, general comments were made on the purpose of the uniform law and on the policies that should guide its preparation. It was pointed out, for example, that the operative rules of the uniform law should be based on actual and sound practice with due regard for modern technological developments. Since current practices differed, the uniform law should help to validate and provide a better link between the different practices. The uniform law should focus on those issues that could not effectively be dealt with at the contractual level, whether by individual stipulations of the parties or by uniform rules such as those prepared by the International Chamber of Commerce (ICC).

16. As regards the wording between square brackets, it was suggested that a more objective criterion should be found (e.g., place of business of guarantor) and that the parties' freedom to choose another law should be clearly stated. The Working Group was agreed that it would be premature at this stage to decide on the territorial scope of application of the uniform law. It was pointed out that the decision would in some respects depend on whether the uniform law would eventually be adopted in the form of a convention or in the form of a model law. In the latter case the question could be settled by rules on conflict of laws that would probably be included in the model law.

Article 2. Guaranty letter

17. The text of draft article 2 as considered by the Working Group was as follows:

"A guaranty letter, whether or not named guaranty letter, guarantee, bond, indemnity or stand-by letter of credit, is an independent undertaking, given by a bank or other institution or person ('guarantor') [at the request of its customer ('principal') or on the instruction of another bank, institution or person ('instructing party') acting at the request of its customer ('principal')] [, whether or not so requested or instructed by another institution or person], to pay to another person ('beneficiary') a certain or determinable amount of a specified currency [, unit of account or other item of value] in conformity with the terms of the undertaking."

18. The view was expressed that this article, despite the use of the term "guaranty letter" and the illustrative listing of guarantee undertakings, could be read as covering not only guarantees and stand-by letters of credit but also commercial letters of credit and even other credits and financial promises. As regards the substantive issue of whether traditional (commercial) letters of credit should be covered, the Working Group reaffirmed its decision taken at the twelfth session "that the uniform law should focus

on independent guarantees, including stand-by letters of credit, and that it should be extended to traditional letters of credit where that was useful in view of their independent nature and the need for regulating equally relevant issues" (A/CN.9/316, para. 125).

19. A suggestion was made that the type of undertakings covered by the uniform law should be referred to as "independent documentary standby". Such independent documentary standby would be defined as an undertaking by a financial institution to a named beneficiary to answer for the payment or discharge of another's debt against documentary demand, whereby the undertaking is independent from any underlying transaction. Another suggestion, which received considerable support, was that the definition set forth in article 2 should be supplemented by a reference to the guaranteeing function or purpose of the undertakings covered. It was pointed out that such a reference should not be restricted to the principal's default, since that would not cover, for example, financial stand-by letters of credit payable against certification that the principal sum was due. It was also pointed out that such a reference might be unduly restrictive of developing practice and could raise doubts about the independent character of the undertaking.

20. Various comments were made on particular elements of the definition set forth in article 2. It was noted, for example, that it was not clear whether all of the undertakings listed in an illustrative manner were independent. Another comment was that the element of "demand" was missing and that that element might appropriately be added in connection with the reference to conformity. As regards the bracketed wordings relating to request and instruction, one view was in favour of the second alternative since it would recognize the practice of undertakings given by the guarantor on its own account or behalf; another view, however, was in favour of the first alternative. No comments were made on the words between square brackets referring to unit of account or other item of value.

21. Finally, a drafting suggestion was made that the definition should be presented in two parts, the first one dealing with the situation of an undertaking by the guarantor towards the beneficiary at the request of the principal, and the second one dealing with situations where more than those three persons or institutions were involved.

Article 3. Independence of undertaking

22. The text of draft article 3 as considered by the Working Group was as follows:

"Variant A: (1) An [international] undertaking is [deemed to be] independent, unless its terms show that the payment obligation depends on the existence or validity of an underlying transaction between the principal and the beneficiary or of any other relationship except that created by the undertaking, or that the guarantor may invoke defences arising from a relationship other than its relationship with the beneficiary.

Variant B: (1) An undertaking is independent if it does not depend on any underlying transaction or other relationship except that created by the undertaking.

[(2) In determining whether or not a given undertaking is independent, any characterization or a single term found in the text of the undertaking shall not be deemed conclusive if the other terms and conditions clearly weigh in favour of the opposite result. In evaluating the terms and conditions in their totality, the following factors may be regarded as points weighing in favour of independence:

(a) Payment promised on 'simple demand', 'first demand', 'demand', 'receipt of written request' or words of similar import;

(b) Undertaking to pay qualified by expressions such as 'unconditional', 'irrespective of valid existence of X-Contract', 'waiving all rights of objection and defences arising from said contract' or 'without proof of default';

(c) Payment against documents, including statement by beneficiary, and not requiring verification of facts outside guarantor's purview;

(d) Reference to an underlying transaction only in a preamble or otherwise in a recital of what has gone before, and not in operative clauses;

(e) Undertaking stated to be subject to Uniform Customs and Practice for Documentary Credits or Uniform Rules for Guarantees.]"

Paragraph (1)

23. The Working Group was agreed that the principle of independence was sound and fundamental to the uniform law. However, divergent views were expressed as to how the principle should be defined.

24. It was noted that Variant A of paragraph (1) differed from Variant B essentially in two respects. The first one was that it included a rule of interpretation in favour of independence. A view was expressed that this rule was contained in the words "deemed to be". Support was expressed for such a rule of interpretation since it would help to solve an impasse in case of otherwise insoluble ambiguity and since the suggested solution accorded with the dominant practice and expectations in international guarantee operations. The prevailing view, however, was that the rule of interpretation should not be retained since it might lead to a result not expected by the parties concerned.

25. The second respect in which Variant A differed from Variant B was its considerably more detailed and comprehensive formulation. Proponents of Variant A pointed in particular at those details that specified the various relationships and referred to defences arising from those relationships. However, the very reference to defences accentuated the concern that the exclusion of defences in the context of the definition of independence might be construed as providing a final answer to such questions as whether payment

may be refused in case of fraud or manifest abuse, whether illegality of the underlying transaction may have an effect on the undertaking in the guaranty letter, or whether set-off was admissible. That concern was the main reason advanced by proponents of Variant B. Yet another view was that Variant B could be combined with Variant A, except for the above rule of interpretation.

26. It was noted in that connection that the questions raised by those concerned about a preclusive effect of the definition of independence were scheduled to be discussed by the Working Group at its fifteenth session, as indicated by the Secretariat in its note A/CN.9/WG.II/WP.68, para. 2. It was agreed that the definition of independence might have to be reviewed and possibly refined in the light of the future conclusions of the Working Group on those questions concerning possible objections to payment.

27. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft of paragraph (1) based on Variant A, excluding the rule of interpretation in favour of independence, and possibly using some of the wording found in Variant B.

Paragraph (2)

28. Some doubts were expressed as to whether provisions of the kind set forth in paragraph (2) were truly needed and helpful. The prevailing view, however, was that it would be useful to provide some guidance in the interpretation of guaranty letters as regards their legal character. While there was wide support for the rules contained in the opening words of the paragraph, some reservations were expressed concerning the factors set forth in subparagraphs (a) through (e).

29. It was pointed out, for example, that the inclusion of certain specific expressions in subparagraphs (a) and (b) accorded them a particular weight and that difficult questions of interpretation might arise in the case of expressions that were similar or were identical only in part. As regards subparagraph (d), one concern was that the very mention of the underlying transaction might undermine the independent nature of the undertaking. Another concern relating to that subparagraph was that it introduced an inappropriate formalism by attaching legal consequences to the location of the reference to the underlying transaction within the text of the guaranty letter.

30. It was noted that the factors set forth in subparagraphs (a) through (e) were merely designed as factors weighing in favour of independence within the evaluation of the terms and conditions in their totality and were thus not conclusive in isolation. In the light of this, a suggestion was made that the uniform law might give one or more expressions such conclusive status that would put the independent characterization beyond doubt.

31. The Working Group, after deliberation, requested the Secretariat to redraft paragraph (2) in the light of the above views and suggestions.

Article 4. Internationality

32. The text of draft article 4 as considered by the Working Group was as follows:

"Variant A: A guaranty letter is international if:

(a) any two of the following places specified in the guaranty letter are situated in different States:

(i) [The place where the guaranty letter was issued][the place of business of the guarantor];
(ii) The place of business of the beneficiary;
(iii) The place of payment;
(iv) The place of business of [a principal or an instructing party][the person at whose request the guaranty letter was issued];
(v) The place of business of a confirming guarantor;

or

(b) if it expressly so states.

Variant B: A guaranty letter is international if any two of the following [persons][parties] have their place of business in different States: guarantor, beneficiary, principal, instructing party, confirming guarantor.

Variant C: A guaranty letter is international if:

(a) the guarantor and the beneficiary have their place of business in different States; or

(b) the place of issue and the place of business of a principal or an instructing party are situated in different States; or

(c) the place of issue and the place of payment are situated in different States;

or

(d) the guaranty letter relates in any other [significant] manner to more than one country.

Variant D: A guaranty letter is international if it relates to an international operation, whether commercial or financial."

33. The view was expressed that the criteria of internationality set forth in article 4 should be made as broad as possible so as to encompass a maximum number of situations. One proposal to that effect was to define an international guaranty letter along the lines of subparagraph (d) of Variant C as one "relating in any significant manner to more than one country". Another proposal was to adopt the wording of Variant D.

34. It was stated in reply that, although a broad definition of the international guaranty letter was needed, it should not have the effect of covering domestic transactions with minimal international contact. The criteria of internationality should not only result in a broad applicability of the uniform law, but also be as objective as possible. The prevailing view was in favour of Variant B; some doubts were expressed as to the usefulness of the place of business of the confirming guarantor as a criterion of internationality.

35. There was wide support for the view that the criteria of internationality should be drafted so as to provide all parties with the highest possible degree of certainty as to the applicability or the non-applicability of the uniform law to a given transaction. With a view to enhancing certainty, it was proposed that the requirement for specification set out in the opening words of subparagraph (a) of Variant A should be adopted. However, since the requirement of specification might create an excessively rigid rule and a somewhat more flexible rule was more appropriate, another proposal was to add to Variant B a provision similar to article 1(2) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "United Nations Sales Convention"), which reads as follows:

> "The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract."

36. After deliberation, the Working Group decided to reconsider both proposals at a later stage.

37. With a view towards further broadening the criteria of internationality, it was proposed that the text of subparagraph (b) of Variant A should be added to Variant B. In response, it was stated that such a reference to party autonomy might be unacceptable to many countries since it could enable parties to avoid the application of mandatory provisions of their domestic law. Another concern was that the provisions of article 4 should not conflict with rules on choice of law that would be discussed by the Working Group at its next session. It was noted that the proposed provision would have a different character and produce different results depending on whether the uniform law was eventually adopted in the form of a convention or in the form of a model law. After deliberation, the Working Group decided to adopt the wording of subparagraph (b) of Variant A but to place it between square brackets.

Article 5. Interpretation of this Law

38. The text of draft article 5 as considered by the Working Group was as follows:

"In the interpretation of this Law, regard is to be had to its international [character][origin] and to the need to promote uniformity in its application and the observance of good faith in international [transactions][guaranty or credit practice]."

39. The Working Group was agreed that this article was useful and appropriate if the uniform law would be adopted in the form of a convention. However, it was stated that such a provision would not be appropriate if the uniform law would be adopted in the form of a model law. For example, national courts could hardly be entrusted with the promotion of worldwide uniformity in the application of their own national statute.

40. In response, it was stated that, although article 5 might not be appropriate in its totality if the uniform law would be adopted in the form of a model law, it would still be useful to the extent that it created a standard of good faith. As regards the wording of the reference to good faith, the words "guaranty or credit practice" were preferred to the word "transactions".

41. The Working Group was agreed that article 5 should be placed between square brackets and reconsidered in the light of the future decision on the form of the uniform law and of future discussions relating to the concept of good faith.

Article 6. Construction of guaranty letter

42. The text of draft article 6 as considered by the Working Group was as follows:

"Variant A: (1) Subject to the provisions of this Law [and of any other applicable law], the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, conditions or usages referred to therein [, and, unless otherwise stipulated, any international usage of which the parties knew or ought to have known and which is widely known to, and regularly observed by, parties to guaranty or credit transactions].

(2) The terms and conditions of the guaranty letter are to be interpreted according to the intent of the parties, taking into account the ordinary meaning in the understanding of a reasonable person with an appreciation of the commercial purpose of the transaction and with due consideration of any practices which the parties have established between themselves.

Variant B: In determining the rights and obligations of the guarantor and the beneficiary, the terms and conditions set forth, or referred to, in the guaranty letter are to be interpreted according to the ordinary meaning given to them by a reasonable person."

43. The discussion of this article focussed on Variant A. This Variant was preferred to Variant B because of its more detailed and comprehensive formulation. Various comments were made in respect of particular elements contained in paragraphs (1) and (2).

Paragraph (1) of Variant A

44. As regards the introductory proviso "Subject to the provisions of this Law", it was understood that it limited party autonomy only to the extent that the uniform law contained mandatory provisions; any non-mandatory provision would, by its nature, be applicable and affect the rights and obligations of the parties only if the matter regulated by that provision was not dealt with by the terms and conditions of the guaranty letter, including any rules, conditions and usages referred to therein. In the preparation of the uniform law, it would have to be decided for each provision whether or not parties may derogate therefrom.

45. As regards the bracketed words "and of any other applicable law", it was stated that those words were redundant, too general to be useful, and potentially misleading and even dangerous. The proposal not to retain them was accepted by the Working Group.

46. The Working Group adopted the central portion of paragraph (1) which reads "the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, conditions or usages referred to therein". It was noted that such rules or usages could, for example, be those prepared by the International Chamber of Commerce. In line th its agreement reached at the thirteenth session (A/CN.9/330, para. 61), the Working Group did not accept a proposal that the uniform law should explicitly refer to the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules on Demand Guarantees (URG).

47. Divergent views were expressed in respect of the bracketed reference to international usage at the end of paragraph (1). One view was that the wording should be retained since it would accommodate those jurisdictions that gave effect to the UCP or the Incoterms even if not referred to in the guaranty letter and since relevant international usages provided a useful or even necessary source for determining the rights and obligations of the parties and for interpreting the terms and conditions of the guaranty letter. The prevailing view, however, was that the reference to international usages should not be retained since it created uncertainty and might provide a trap to unwary parties.

48. The Working Group, after deliberation, adopted paragraph (1) except for the wordings placed between square brackets.

Paragraph (2) of Variant A

49. Divergent views were expressed as to the first criterion of interpretation mentioned in paragraph (2), namely "the intent of the parties". One view was that the criterion was usually the primary criterion for interpreting contracts or declarations and that it was particularly useful in the area of guaranty letters since these were often drafted in an ambiguous or imprecise manner.

50. The prevailing view, however, was that the criterion was too subjective and was inappropriate for a guaranty letter that was more formal in character than, say, a sales contract. Additional uncertainty arose from the reference to "the parties" since it was unclear which parties were meant in the context of a given guaranty letter and whether it would, for example, be necessary to know or to enquire who the author of the terms of the guaranty letter was. A more limited proposal that the primary criterion should be the common and established intent of the guarantor and the beneficiary was not accepted by the Working Group.

51. Some support was expressed for retaining the criterion of "the ordinary meaning in the understanding of a reasonable person with an appreciation of the commercial purpose of the transaction". The prevailing view, however, was against its retention since it did not provide sufficient guidance in interpretation in that it was to some extent redundant and, in the typical situation of disputed terms, of little use. A suggestion was made that a more appropriate criterion would be the understanding of a knowledgeable and prudent document checker or the common sense of the banking industry as laid down in bankers' manuals or white papers. It was stated, in reply, that such a criterion was too subjective, uncertain and hardly acceptable to other parties involved in guarantee and credit operations.

52. Some support was expressed for giving due consideration to "any practices which the parties have established between themselves", since this would be in conformity with their intentions and expectations and accord with the principles of good faith or estoppel. The prevailing view, however, was that the interpretation should not be based on previous practices since reliance on extraneous facts was contrary to the principle of strict construction. In this connection, a question was raised whether the provisions of article 6 were rules of interpretation or dispute resolution clauses.

53. It was noted that the concept of strict compliance was dealt with separately in the note by the Secretariat contained in document A/CN.9/WG.II/WP.68. The separate treatment was based on the distinction between the interpretation of the terms and conditions, including the conditions of payment, of the guaranty letter according to article 6 and the verification of compliance of the payment claim with these conditions. A concern was expressed that the distinction was artificial in that bankers regarded the interpretation of the guaranty letter, which to them was relevant only to the submission of documents, and the verification of documentary compliance as one single process in which only one standard should apply.

54. The Working Group, after deliberation, decided not to retain paragraph (2). The decision was not meant to preclude any later proposal for a new rule of interpretation that might be made in the light of future deliberations of other provisions.

Article 7. Form and time of establishment

55. The text of draft article 7 as considered by the Working Group was as follows:

"(1) A guaranty letter may be established by any means of communication that provides a record thereof.

Variant A: (2) A guaranty letter becomes binding and, unless it expressly states that it is revocable, irrevocable, when it is received by the beneficiary [, unless the beneficiary promptly rejects it]. The guaranty letter becomes effective at that time, unless [it states a different time of effectiveness or makes its effectiveness depend on the occurrence of a specified, uncertain future event, in which case the guarantor may require a declaration from the beneficiary or an appropriate third party stating the occurrence of the event, if verification of that occurrence is not within the control of the guarantor] [it expressly provides that its effectiveness is subject to a specified condition that is determinable by the guarantor].

Variant B: (2) Unless otherwise stated, a guaranty letter is effective and irrevocable, when it is issued by the guarantor to the beneficiary or to the principal or instructing party."

Paragraph (1)

56. It was noted that paragraph (1) was modelled on article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration and that it was based on the view, widely supported at the thirteenth session (A/CN.9/330, para. 105), that the guaranty letter should be manifest or recorded in some tangible or material form, to the exclusion of purely oral undertakings. Various comments were made concerning the purpose of the provision and its formulation.

57. A question was raised as to whether paragraph (1) was designed to provide a rule of evidence, as might be inferred from the use of the word "record". It was stated in reply that the purpose of the provision was to establish the formal requirement of validity of the guaranty letter without taking a stand on the evidentiary value of any form of communication record covered by it. If there was any need for defining certain terms that had evidentiary implications (e.g. signature or authentication) or for including rules of evidence applicable in court or arbitral proceedings, it would be appropriate to consider those matters separately and at a later stage.

58. A proposal was made that the uniform law should merely require that the undertaking be made expressly so as to exclude tacit or implied undertakings. It was agreed that the uniform law should not give effect to tacit or implied undertakings, which were uncertain and undesirable, and that consideration might be given either to disregarding them or to excluding them from the scope

of application of the uniform law. It was realized that whatever decision was taken on that matter it would not address the question of formal validity. With a view to not invalidating purely oral undertakings, a proposal was made that the uniform law should not establish any requirement of form or that it should exclude such undertakings from its scope of application. The Working Group did not accept that proposal, on the ground that purely oral undertakings created uncertainty and did not conform to sound banking practice.

59. While there was wide support for the approach taken in paragraph (1), questions were raised as to whether the provision provided clear answers in all situations. One example was the establishment of a guaranty letter by telephone where the conversation was recorded on tape. The answer given was that this method of establishment would not meet the requirement of form under paragraph (1) since that provision covered only those records provided by the chosen means of communication, i.e. any output of the communication system itself. Another example was the establishment of a guaranty letter by electronic means where the message appeared on the recipient's screen and could still be altered before it was printed out. The answer given was that the form requirement of paragraph (1) was met once the message was either stored in a memory or printed out or otherwise left an audit trail. In this connection, a proposal was made that the record required by paragraph (1) should be one that could not be altered or tampered with. It was stated in reply that such a requirement, while commendable in its aim of creating security and certainty, would be too strict in practical terms.

60. Based on the above example of an electronic message that had not yet been printed out, a proposal was made that the uniform law should require that the guaranty letter be established "in writing or by any other means capable of providing [in an automatic manner] a written record thereof". Another proposal was to require a "writing" and to define that term as including "an authenticated teletransmission or tested electronic data interchange ('EDI') message equivalent thereto". It was noted that this wording was taken from article 2 URG where the term "writing" was used to delimit the scope of application and not to establish a rule of formal validity. 3/

61. The Working Group, after deliberation, requested the Secretariat to review and redraft the provision of paragraph (1), taking into account in particular the last proposal.

Paragraph (2)

Statutory time of effectiveness

62. Divergent views were expressed as to the point of time when the guaranty letter, unless otherwise stated therein, would be binding and effective. Under one view the determinant point of time should be the receipt by the beneficiary, as provided in Variant A. The main reason given was that the guaranty letter established a relationship between the guarantor and the

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3/ Articles of URG referred to in this report are those of the ICC Draft Uniform Rules for Demand Guarantees contained in ICC Document No. 460/470-1/Int.16 (7 June 1990).

beneficiary and that it was only upon receipt that the beneficiary was in a position to rely on the guarantor's undertaking. Before that point of time,there was no need to bind the guarantor to its undertaking, even though an earlier point of time might be relevant for regulatory or accounting purposes. While no express acceptance of the guaranty letter should be required, receipt of the guaranty letter was a necessary condition for acceptance by silence and for a possible rejection.

63. The prevailing view, however, was that the determinant point of time should be the release or issue of the guaranty letter, as provided in Variant B (and in article 6 URG). It was stated in support that guarantors regarded themselves bound once the guaranty letter had left their sphere of control. The time of issue provided a certain and definite criterion, unlike the time of receipt, which could be difficult or cumbersome to ascertain. Certainty about the time of effectiveness was not only desirable for regulatory or accounting purposes but also of interest and benefit to all parties concerned, including any intermediary banks.

64. It was noted that guaranty letters were not always issued directly to the beneficiary as the ultimate addressee; they might be dispatched to the principal (e.g. in the case of tender guarantees) or an instructing party, as envisaged in Variant B, or even to an advising or confirming bank. In view of the variety of conceivable fact situations, it was agreed not to attempt to list all possible forwarding intermediaries but merely to refer to the time when the guaranty letter was "issued by the guarantor".

Possibility of prompt rejection by beneficiary

65. Some proponents of the time of issue and some proponents of the time of receipt expressed support for the proviso set forth in Variant A "unless the beneficiary promptly rejects it" (i.e. the guaranty letter). Since the guaranty letter created a relationship between the guarantor and the beneficiary, it should not be regarded as being effective where the beneficiary rejected it promptly upon receipt. While no express acceptance should be required, the guaranty letter should not be imposed on an unwilling beneficiary.

66. It was stated in reply that the possibility of rejecting the guaranty letter should be dealt with separately from the time of effectiveness since here certainty was paramount. The very notion of rejection vis-à-vis the guarantor was not easily reconciled with the factual situation that the guaranty letter was issued at the request of the principal and presumably in conformity with the terms of the instructions. If a given guaranty letter did not meet the expectations of the beneficiary, it was rarely for the guarantor alone to meet those expectations which, moreover, were more likely to aim at an amendment of the guaranty letter than a total rejection. To the extent that a need for rejection should be recognized by the uniform law, consideration could be given to including a rule on rejection, release or waiver by the beneficiary without however requiring that a rejection had to be made promptly upon receipt.

67. The Working Group, after deliberation, decided to maintain the proviso between square brackets and to reconsider the matter at a later stage.

Clauses in guaranty letters concerning time of effectiveness

68. The Working Group was agreed that the statutory time of effectiveness set by the uniform law should not be determinative when the guaranty letter stated a different time of effectiveness, as provided in Variant A. Such a clause could refer either to a fixed date or to a determinable period of time.

69. The Working Group considered whether the statutory time of effectiveness could be derogated from by a clause in the guaranty letter that would postpone the effectiveness to the time of fulfilment of a specified condition. No objections were raised against clauses under which the fulfilment of the condition was clearly determinable in that fulfilment had to be established by a document or by a written declaration of the beneficiary or another specified person or that its verification was within the purview of the guarantor.

70. However, divergent views were expressed as regards the remaining clauses, which contained so-called non-documentary conditions. Recalling its discussion at the thirteenth session (A/CN.9/330, paras. 68-75), the Working Group was agreed that the problem of non-documentary conditions of effectiveness was essentially the same as that of non-documentary conditions of payment. In fact, one could even regard any condition of effectiveness (e.g. advance payment under a repayment guaranty letter) as a condition of payment.

71. One view was that non-documentary conditions should be disallowed or disregarded, as provided at the end of Variant A in the bracketed wording that was modelled on article 6 URG. It was pointed out that conditions requiring investigation into extraneous facts were undesirable in that they fell outside the ordinary business of banks and tended to undermine the independent character of the undertaking. In fact, one could even regard undertakings with non-documentary conditions as accessory undertakings that were outside the scope of the uniform law. Moreover, non-documentary conditions were often included due to inadvertance; to the extent that they were included intentionally, practice showed that there existed a potential for fraud, abuse or misrepresentation.

72. Based on similar considerations, another view was that non-documentary conditions should be converted into documentary ones, as provided in the bracketed wording of Variant A that "the guarantor may require a declaration from the beneficiary or an appropriate third party stating the occurrence of the event". It was pointed out that this wording reflected the view that prevailed at the thirteenth session (A/CN.9/330, para. 75). A suggestion was made that the formulation of that wording might be refined by taking into account different kinds of condition. Another suggestion was to recommend to the parties to agree on the means of verification or evidence and, failing agreement, to let a declaration by the beneficiary suffice.

73. Another view, based on different considerations, was that the uniform law should neither disregard non-documentary conditions nor convert them into documentary conditions, but should leave them intact, as provided in Variant B. While a given non-documentary condition might lead to the conclusion that the undertaking was not independent as defined in article 3, that was not always the case, and it would be contrary to the autonomy and expectations of the parties not to respect a condition that formed part of an independent undertaking. The current use of such clauses suggested a practical need

therefor and, to the extent that banks regarded them as undesirable or contrary to sound banking practice, it was for them to refuse or discourage their inclusion in guaranty letters.

74. Yet another view, shared by some proponents of the above views, was that consideration might be given to excluding from the scope of application of the uniform law all undertakings that contained any non-documentary condition of effectiveness or payment. If the definition of guaranty letter in article 2 and the definition of independence in article 3 were revised so as to restrict the scope of application to what might be called "documentary guaranty letters", the uniform law would not regulate any undertakings with non-documentary conditions, i.e. neither give effect to such conditions nor invalidate them or convert them into documentary ones. It was stated in reply that non-documentary conditions created considerable problems in practice that called for legal answers. Instead of ignoring or discarding the problem, every effort should be made to finding an acceptable solution, based on further considerations of the kinds of conditions at issue and the precise meaning of independence.

75. The Working Group, after deliberation, decided to reconsider at a future session the problem of non-documentary conditions, including the possibility of limiting the scope of application of the uniform law to documentary undertakings. The Working Group later resumed its discussion on non-documentary conditions (see below, paras. 111-118).

III. DISCUSSION OF FURTHER ISSUES OF A UNIFORM LAW: AMENDMENT, TRANSFER, EXPIRY, AND OBLIGATIONS OF GUARANTOR

A. Amendment

76. The Working Group discussed questions relating to the amendment of the guaranty letter on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 3-17). It was agreed that the uniform law should contain provisions on the amendment of a guaranty letter.

Parties whose consent is required

77. As regards the parties whose consent was required for an amendment to be effective, it was agreed that the guaranty letter could not be modified without the consent of the guarantor, whose obligations were at stake, and that of the beneficiary, whose rights were at stake. Divergent views were expressed on whether, in addition, the consent of the principal should be required. One view was that an amendment should not be given effect without the principal's consent since the original guaranty letter had been established on the instructions of the principal and the effect of an amendment would be to modify the original terms. The requirement of the principal's consent served also the interest of the guarantor in that it would remove a possible objection by the principal against a later claim for reimbursement.

78. The prevailing view, however, was that the consent of the principal should not be a requirement for the amendment to be effective since the amendment concerned the guaranty letter that created a relationship only between the guarantor and the beneficiary. Any considerations about the instructions or wishes of the principal as well as the guarantor's position in a later claim for reimbursement related exclusively to the separate relationship between the guarantor and the principal.

79. It was felt that these considerations could be addressed in the uniform law, but separately from the rule requiring the consent only of the guarantor and the beneficiary. One proposal was to add such wording as: "This provision does not excuse the failure to obtain the principal's consent, as it may be required by the agreement or instructions between the principal and the guarantor". Another proposal was to require the guarantor to inform the principal about any amendment or any request for an amendment. Yet another proposal was to provide that the guarantor could in its relationship with the principal invoke an amendment only if it had been consented to by the principal.

80. Divergent views were expressed as to whether the beneficiary's consent had to be express or whether silence imported acceptance. One view was that the consent had to be express or, possibly, confirmed by an act or conduct in compliance with the terms of the amendment. It was stated in support that the established relationship could be modified only by a clear agreement of the parties and that express acceptance was, in particular, required where the amendment was to the disadvantage of the beneficiary.

81. Another view was that acceptance could be imported from silence, i.e. where the beneficiary had not rejected the amendment promptly or within a specified period of time. It was pointed out that this view conformed to the approach taken by the Working Group in respect of the establishment of the guaranty letter (article 7(2)) and that it took into account the fact that the bulk of amendments (e.g. extension of validity periods) increased the rights of the beneficiary.

82. The Working Group did not accept a proposal to prepare a dual set of rules depending on whether a given amendment was beneficial or disadvantageous to the beneficiary. It was felt that rules that involved subjective judgments were not easy to administer.

83. The Working Group, after deliberation, was agreed that it would decide at a future session, on the basis of alternative draft provisions prepared by the Secretariat, whether the beneficiary's consent had to be express or whether silence imported consent.

Form of amendment

84. The Working Group was agreed that an amendment could be made in any form in which a guaranty letter could be established according to article 7(1), since there were no reasons for a stricter or for a more lenient requirement of form. Consistency was also appropriate in view of the fact that an amended guaranty letter might be regarded as a new guaranty letter.

85. It was agreed that the provision on the form of amendments should not be mandatory, so as to give effect to any different form of requirement stated in the guaranty letter or otherwise agreed upon by the guarantor and the beneficiary. A view was expressed that the non-mandatory nature of the provision might require further consideration. A proposal was made to add a rule along the lines of article 29 United Nations Sales Convention.

Time of effectiveness

86. The Working Group was agreed that the rule on the time of effectiveness of an amendment should follow the approach taken in respect of the time of effectiveness of the original guaranty letter. It was recalled that, in the context of article 7(2), the Working Group had favoured the time of issue as the determinant point of time and that the proviso referring to the beneficiary's prompt rejection of the guaranty letter had been maintained between square brackets for later reconsideration.

87. It was realized that the future rule on the time of effectiveness of an amendment would depend on which of the two above views (paras. 80 and 81) concerning the import of the beneficiary's silence would be adopted. If the decision would be in favour of acceptance by silence, the future rule on amendment could be closely modelled on the rule on establishment that included the proviso. If the decision would be in favour of express acceptance, the time of acceptance could determine the time of effectiveness or the acceptance could be given retroactive effect. The Working Group requested the Secretariat to prepare alternative draft provisions reflecting those views.

B. Transfer of rights and assignment of proceeds

88. The Working Group discussed questions relating to the transfer of rights and the assignment of proceeds on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 18-23). It was agreed that the distinction, drawn in that note as well as in UCP and URG, between the transfer of the beneficiary's right to claim payment under the guaranty letter and the mere assignment of the proceeds was valid and useful.

Transfer of rights

89. The Working Group was agreed that the beneficiary should not be allowed to transfer its rights without the guarantor's authorization, which could be stated in the guaranty letter or given separately. The requirement of authorization was said to accommodate the guarantor's possible wish as a debtor of not being faced with an unacceptable new creditor and, even more importantly, to accommodate indirectly the interest of the principal in having the rights under the guaranty letter rest with the person whose risk was to be covered by the guaranty letter. The latter consideration was of special importance where the beneficiary was the creditor of an underlying transaction with the principal.

90. A more restrictive proposal was to limit the right of transfer to those cases where the secured creditor under the underlying relationship changed, whether by assignment of the underlying contract or otherwise. In this context, the Working Group discussed the possible effect of such a change on the relationship between the beneficiary and the guarantor. It was noted that

divergent conclusions could be drawn, for example, automatic termination of the guaranty letter, or automatic transfer of the benficiary's rights, or no automatic effect at all, in which latter case any claim by the beneficiary, who was no longer the principal's creditor, might constitute an abuse of rights. The Working Group concluded that there was a need for further study of the problem.

Assignment of proceeds

91. The Working Group was agreed that the beneficiary was free to assign any proceeds that were forthcoming when the guarantor would honour its undertaking under the guaranty letter. While some doubts were expressed as to whether a rule to that effect was needed in the uniform law, the Working Group concluded that such a rule could be useful.

92. Divergent views were expressed as to whether additional rules should be envisaged dealing with notice of assignment to the guarantor and other details of implementation. One view was that it was not appropriate to attempt, in the context of the uniform law, to unify the disparate national laws on assignment and, for example, to regulate notice of assignment as a requirement of validity. Another view was that the uniform law should address those issues that had a direct bearing on the relationship between the beneficiary and the guarantor. One such issue was the requirement of notice, which was relevant for the guarantor's discharging properly its payment obligation. It was stated in reply that the issue of proper discharge embraced other questions as well, for example, bankruptcy of the beneficiary or payment to a collecting agent.

93. The Working Group, after deliberation, requested the Secretariat to prepare draft provisions covering notice and possibly other details of implementation as a basis for a later reconsideration of the matter.

C. Expiry

94. The Working Group discussed questions relating to the expiry of the guaranty letter on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 24-43). It was agreed that certainty about the expiry was of considerable practical importance and that the uniform law could enhance certainty in two respects, namely as regards the meaning and effect of expiry as stipulated in the guaranty letter and as regards possible requirements relating to expiry clauses.

Meaning and effect of expiry

95. The Working Group was agreed that the meaning of an expiry date stated in the guaranty letter was that a demand for payment, accompanied by any required documents, may be made only before or on that date and that, accordingly, the guarantor was not obliged to pay upon any demand made after that date. In view of the fact that courts of some jurisdictions had given a different interpretation, it was agreed to enshrine that meaning in the uniform law, by a provision along the lines of article 19 URG. Article 19 URG reads:

"A claim shall be made in accordance with the terms of the Guarantee on or before its expiry and, in particular, all documents specified in the Guarantee for the purpose of claiming shall be presented to the Guarantor on or before its expiry at its place of issue, otherwise the claim shall be refused."

96. It was agreed that the future provision should clarify whether the relevant time of making a demand was the time of dispatch by the beneficiary or the time of receipt by the guarantor. No comments were made as to whether the provision should be mandatory.

97. The Working Group was agreed that the effect of expiry was automatic in that it did not depend on any further act such as return of the guaranty letter or a declaration of release by the beneficiary. This understanding should be reflected in the uniform law, at least as regards the issue of return of the guaranty letter, along the lines of article 24 URG, which reads:

"Where a Guarantee has terminated by payment, expiry, cancellation or otherwise, retention of the Guarantee or of any amendments thereto shall not preserve any rights of the Beneficiary under the Guarantee."

98. Consideration might also be given to including a provision like article 23 URG dealing with return of the guaranty letter and release before expiry. It was pointed out that any provision that was taken from the URG would gain a different legal effect when it was incorporated into the uniform law and enacted in a given State in that it would, unlike any contractual provision, displace any provision of law such as one that would make expiry depend on the return of the guarantee instrument.

Possible requirements relating to expiry clauses

99. The Working Group was agreed that expiry clauses could validly refer to a specific date or to a specified period of time after the issue of the guaranty letter. As regards clauses that linked expiry to a certain act, event or other condition, a distinction had to be drawn depending on whether the determination of expiry required a verification or investigation into facts. If no such verification was required because expiry was based on the presentation of certain documents, no serious problems were envisaged, except that there might be a risk of an everlasting undertaking, at least if a document was to be furnished by the beneficiary.

100. However, serious misgivings were expressed as regards those other clauses that required an investigation into facts outside the purview of the guarantor. It was therefore suggested that any non-documentary condition of expiry be read as, or converted into, a documentary one. It was noted that the documentary approach was taken by article 22 URG, which appeared to qualify the presentation of documents itself as an expiry event. Article 22 URG reads:

"Expiry of a Guarantee for the presentation of claims shall be upon a specified calendar date ('Expiry Date') or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry ('Expiry Event'). Claims received after the Expiry Date or Expiry Event shall be refused by the Guarantor."

101. Divergent views were expressed as to whether the uniform law should require guaranty letters to contain an expiry clause and, if so, what the sanction for failure should be. While some support was expressed for invalidating guaranty letters without an expiry clause, the prevailing view was not to require expiry clauses, since guaranty letters without such clauses were found in practice and there might be good reasons for that practice. However, consideration might be given to setting in the uniform law a cut-off period of, say, five years which would determine the expiry of those guaranty letters that did not contain any expiry clause. In drafting a provision to that effect for later consideration by the Working Group, the Secretariat should take into account the possible interest of parties in extending the validity period beyond that cut-off point.

102. The Working Group, after deliberation, requested the Secretariat to prepare draft provisions on expiry on the basis of the above conclusions and suggestions.

D. Obligations of guarantor

103. The Working Group discussed questions relating to the obligation of the guarantor to pay upon conforming demand (including the issue of the standard of examination as to conformity), based on the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 44-57). 4/

104. As regards the proper form of a demand, the Working Group was agreed that purely oral demands should not be permitted.

105. A proposal was made that the uniform law should list, in the context of fulfilment of payment conditions or in article 3(2)(c), the four main types of guaranty letter commonly used in practice. These types were, briefly described, that payment was due 1) on simple demand, 2) against an additional declaration of the beneficiary about the principal's default, 3) against an additional specification of the obligations breached by the principal, or 4) against documentary evidence of the principal's default (e.g. certificate by third party, judicial or arbitral decision). The proposed listing, which should not be exhaustive, would serve an educational purpose and convey the message that all four types were being used and recognized in international practice. The proposal was opposed on the grounds that the listing of such particulars of ever-developing practice was inappropriate in a law, unless there was a clear regulatory purpose, and that it could be misunderstood as giving special recognition to the four types listed.

106. As regards the standard of examination of documents, wide support was expressed for including in the uniform law a provision along the lines of article 9 URG. Article 9 URG reads:

4/ For lack of time, the Working Group did not consider the issues of the time allowed for examination, duties of notification, and liability and exemption discussed in document A/CN.9/WG.II/WP.68, paras. 58-72.

"All document(s) specified and presented under a Guarantee, including the claim, shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform with the terms of the Guarantee. Where such document(s) do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused."

107. Particular support was expressed for the notion of facial conformity and the requirement of reasonable care. Various suggestions were made with a view to providing further guidance relating to the notion of facial conformity and the requirement of reasonable care. One suggestion was that the uniform law should enshrine the principle of strict compliance of the documents with the terms of the guaranty letter. It was pointed out, however, that this commonly accepted principle might not provide clear answers as to the tolerable degree of deviations and that there might be fewer occasions for its application in the context of guaranty letters than there were in the context of commercial letters of credit. Another suggestion was that the requirement of reasonable care should be interpreted in the light of established customs and practice. Yet another suggestion was that the reasonable care required of the guarantor should be determined according to the conduct of the most diligent issuers of guaranty letters. It was stated in reply that any standard of care had to be judged with respect to the relevant group of persons and that, in a situation with potentially conflicting interests, no preference should be given to one such group of persons.

108. Based on the aforementioned discussion in the Working Group the following wording was proposed:

"When construing the terms and conditions of independent guarantees or stand-by letters of credit, the guarantor or issuer must do so strictly, that is by using reasonable care to establish facial conformity, to be judged in accordance with the best standards of independent guarantee and stand-by letter of credit practice."

109. While there was wide support for the approach taken in that proposal, concerns were expressed as regards its wording. One concern was that the standard to be applied to the guarantor's conduct was described in a somewhat circular manner. Another concern was that the reference to the best standards of independent guarantee and stand-by letter of credit practice might be too general to provide clear answers in specific cases where guidance was needed. Yet another concern was that the reference to the "best" standards, while commendable in its aim, might not be generally acceptable.

110. The Working Group, after deliberation, decided to continue its consideration of the proposal at a future session and requested the Secretariat to prepare alternative draft versions based on the proposal and on article 9 URG.

E. Treatment of non-documentary conditions

111. In response to a strongly expressed concern, the Working Group resumed its discussion on non-documentary conditions that it had engaged in when considering Variant A of draft article 7(2) (see above, paras. 70-75). The concern was that the problem of non-documentary conditions was a fundamental

one that had implications on all issues to be discussed in the preparation of the uniform law. It was said that it called for a prompt and satisfactory solution, which would be to restrict the scope of application of the uniform law to those independent undertakings that were documentary in nature. Non-documentary conditions were highly undesirable since they created uncertainty and placed on banks a burden of examining extraneous facts that was outside their ordinary business (as described by the maxim: banks deal in documents and not in goods).

112. Non-documentary conditions were said to enter into the texts of guarantee undertakings in two different kinds of ways. The first one was described as negligence or inadvertance of the issuing bank that, for example, forgot to mention one of the various documents normally required for the type of undertaking at hand. The second one was described as intent or design by the guarantor and, presumably, the principal, for example, where in an apparently independent and documentary guarantee a non-documentary condition relating to the underlying transaction was included. It seemed appropriate to cover situations of the first type in the uniform law and either to ignore the non-documentary condition or to convert it into a documentary condition. However, situations of the second type should be excluded from the scope of application of the uniform law. Undertakings given in such situations should not be accorded credibility or an aura of certainty.

113. On the basis of the above concern the following proposal was made:

> "1. Scope: This project encompasses only independent documentary undertakings.
>
> 2. Where an undertaking is so drafted as to be essentially an independent documentary undertaking but it includes a condition which is not required to be supported by a document and if that condition does not have the effect of rendering the undertaking to be essentially non-documentary, it will fall within the scope of the UNCITRAL law/convention. The non-documentary condition will either be ignored or converted into a documentary condition depending upon the decision of the Working Group in future sessions.
>
> 3. Where an undertaking is so drafted as to be essentially non-documentary even though it includes documentary conditions, it will not come within the scope of the UNCITRAL law/convention. Whether it is enforceable and under what terms will be solely a matter of municipal law.
>
> 4. The determination of whether an undertaking is essentially documentary or non-documentary must be made by examining the nature of the undertaking in light of guaranty/standby practice in order to determine whether it is of the type and format customarily issued as a non-documentary or as a documentary undertaking."

114. Various comments were made concerning the concept and purpose underlying the proposal, the appropriateness of the suggested solution and the distinction between an essentially documentary and an essentially non-documentary undertaking. As regards the underlying concept, it transpired during the discussion that the proposal was based on an approximation of the independent and the documentary character of the undertaking. The purpose of that approach was to restrict the scope of application of the uniform law more

than was currently done by the requirement of an independent undertaking as defined in draft article 3, in that the proposal covered non-documentary conditions that did not render the undertaking accessory by providing the guarantor with a defence arising from the underlying transaction.

115. Divergent views were expressed as to the suggested solution of excluding such types of undertakings from the scope of application of the uniform law. One view was that the solution was acceptable since it would leave intact party autonomy but not encourage the use of such uncertain undertakings or give them credibility. Another view was that it was desirable, instead of leaving those undertakings to the disparate and uncertain national laws, to regulate them in the uniform law, in particular if they created problems that could not be avoided or taken care of by the banks themselves. Yet another view was that, while the exclusion of such undertakings from the scope of application might appear to be desirable, acceptance of that solution would ultimately depend on whether one could draw a precise demarcation line between those types of undertakings that should be excluded and those that should be included in the scope of application of the uniform law.

116. Support was expressed for the distinction drawn in the above proposal between essentially documentary and essentially non-documentary undertakings. Doubts were expressed, however, in respect of the rule of interpretation suggested in the last part of the proposal (sub 4.). It was doubted, for example, whether it was appropriate and fair in situations involving three persons with potentially conflicting interests to refer to what is customarily issued. Another doubt was whether there in fact existed sufficiently precise types and formats of undertakings that could provide clear answers in the doubtful cases where guidance was needed. To the extent that the distinction was reflective of the distinction between inadvertant and intentional inclusion of non-documentary conditions, another doubt was whether that would not introduce an element of subjectivity and uncertainty. It was stated in reply that the notion of intent had to be understood in an objectivised manner, that sufficiently precise types and formats of undertakings had been evolving in practice and a synopsized description thereof could usefully be included in the definitional section of the uniform law. Furthermore, it was stated that in a situation of potential conflict between the principal and the beneficiary it was for the guarantor to play a neutral role as a trusted and reliable paymaster.

117. With a view to reducing the uncertainty surrounding the suggested distinction, a suggestion was made that an undertaking in which certain words such as "independent documentary standby" were used should be deemed to be essentially documentary. Another suggestion was to define clearly the term "non-documentary condition" and, in particular, to determine what kinds of condition should be treated as non-documentary.

118. The Working Group, after deliberation, was agreed that the problem of non-documentary conditions which had given rise to the above concern was a fundamental and complex one, and that the proposal to exclude essentially non-documentary undertakings from the scope of application of the uniform law provided a useful basis for further deliberations that were needed for finding a satisfactory solution.

IV. OTHER BUSINESS

119. The Working Group decided to hold its fifteenth session from 13 to 24 May 1991 in New York. Subject to approval by the Commission at its twenty-fourth session (Vienna, 10 - 28 June 1991), the Working Group would hold its sixteenth session from 4 to 15 November 1991 at Vienna.